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No. 89-611

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1989

LANSON NEWSOME, WARDEN,
GEORGIA STATE PRISON,
Petitioner,

vs.

CALVIN GUNN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT CALVIN GUNN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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32 pp

QUESTION PRESENTED

I. WHETHER THE COURT OF APPEALS' ANALYSIS OF THE ABUSE OF THE WRIT ISSUE WAS FULLY CONSISTENT WITH THE PRECEDENTS OF THIS COURT AND THE APPLICABLE STATUTORY PROVISIONS

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Respondent Calvin Gunn respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit herein.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

(i) Nature of the Case

This is a habeas corpus case arising under 28 U.S.C. § 2254. Respondent Calvin Gunn was tried for murder before a jury in Rabun County, Georgia in June 1979. At the conclusion of the evidence, the trial court instructed the jury on both malice murder and voluntary manslaughter under Georgia law. As part of its instructions, the court instructed the jury that "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but this presumption may be rebutted." Gunn was convicted of malice murder, and the Georgia Supreme Court affirmed Gunn's conviction on direct appeal. *Gunn v. State*, 245 Ga. 359, 264 S.E.2d 862 (1980). Gunn's lawyer on direct appeal did not challenge the constitutionality of the trial court's instruction on intent.

(ii) Habeas Proceedings Below

In July 1982, Gunn, proceeding *pro se*, filed a petition seeking federal habeas corpus relief pursuant to 28 U.S.C. § 2254. In his first federal petition Gunn raised six grounds for relief. Five of these grounds were identical to issues that Gunn's lawyer had raised in the direct appeal; none of the grounds addressed the constitutionality of the trial court's charge on intent. Despite the fact that Gunn initially had pursued collateral remedies in federal court rather than exhausting available state remedies, the State responded on the merits to each claim. Gunn's first federal petition was denied in April 1983.

In September 1985, some four months after this Court's decision in *Francis v. Franklin*, 471 U.S. 307 (1985),

Gunn, again proceeding *pro se*, filed a state habeas petition in the Superior Court of Tattnall County, Georgia. Gunn's sole ground for relief was that the trial court's jury instruction on intent – which was virtually identical to the instruction found unconstitutional in *Franklin* – created an unconstitutional presumption of intent to kill and relieved the State of its burden of proof on this essential element of the crime of murder. The State did not raise any state law procedural default bar, instead responding to Gunn's claim on the merits. Following an evidentiary hearing, the superior court in February 1986 denied relief. The state habeas court, without reference to *Franklin*, acknowledged that the challenged language was a "problem maker," yet held that the charge in Gunn's case created only a permissive inference of intent and thus was permissible. In March 1986 the Georgia Supreme Court denied Gunn's application for a certificate of probable cause to appeal.

Having exhausted his state remedies, Gunn returned to federal court and filed a *pro se* petition for habeas relief in the United States District Court for the Northern District of Georgia. In his second federal petition, Gunn again raised as his sole ground for relief that the jury charge on intent was unconstitutionally burden-shifting as demonstrated by *Franklin*. The State responded to Gunn's petition by asserting that it should be dismissed as an abuse of the writ. The magistrate concluded that Gunn had not abused the writ and, addressing the merits of Gunn's petition, found that the trial judge's instruction on intent was unconstitutional. The magistrate recommended that habeas corpus relief be granted.

The district court, after a *de novo* review of the record, adopted the magistrate's findings and granted Gunn habeas corpus relief. (A copy of the district court's order, dated March 10, 1987, is Appendix B to the Petition for

Certiorari.) Specifically, the district court concluded that Gunn's second petition was not barred by the doctrine of abuse of the writ, in light of Gunn's *pro se* status in the first federal habeas proceeding and the fact that *Franklin* was decided after that first petition had been denied. Petition for Certiorari, p. 50a. Proceeding to the merits of Gunn's petition, the district court concluded that under *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Franklin* the trial court's charge on intent had impermissibly shifted the burden of proof to Gunn, that this constitutional error was not cured by other language in the charge, and that the burden-shifting charge was not harmless error. Petition for Certiorari, pp. 51a-53a.

(iii) Proceedings Before the Court of Appeals

The State appealed the district court's order, and following briefing and oral argument, a panel of the Eleventh Circuit Court of Appeals affirmed the award of habeas relief. *Gunn v. Newsome*, 851 F.2d 1294 (11th Cir. 1988). (A copy of the panel opinion of the Court of Appeals, dated August 8, 1988, is Appendix C to the Petition for Certiorari.) The State petitioned for rehearing *in banc*, citing as error the panel's treatment of the abuse of the writ issue. Rehearing was granted, briefs were submitted and oral argument was made before the full court. On August 7, 1989, the Eleventh Circuit Court of Appeals issued its *in banc* opinion affirming the grant of habeas relief to Gunn. *Gunn v. Newsome*, 881 F.2d 949 (11th Cir. 1989) (*in banc*). (A copy of the Court of Appeals' *in banc* opinion is Appendix A to the Petition for Certiorari.)

The Court of Appeals, by a seven to six margin, affirmed the judgment of the district court. In so doing, the majority opinion (per Kravitch, J.) examined the history and purpose of the abuse of the writ doctrine and con-

cluded that the district court correctly rejected the State's abuse of the writ claim and addressed the merits of Gunn's second federal habeas petition. In reviewing Gunn's knowledge and actions, the Court of Appeals applied an objective test to determine whether a reasonably diligent *pro se* petitioner, standing in Gunn's shoes, should have raised the *Sandstrom/Franklin* issue at the time of Gunn's first federal petition. Petition for Certiorari, pp. 25a-28a. The court acknowledged that this objective standard was different from the subjective test utilized in abuse of the writ cases in the Fourth and Fifth Circuits, but stated that an objective standard serves the desired objective of "minimiz[ing] abusive conduct without unduly foreclosing the consideration of subsequent petitions that are not truly abusive." Petition for Certiorari, p. 21a. Taking note of the equitable origins of the abuse of the writ doctrine, the Court of Appeals rejected the State's suggestion that *pro se* petitioners should be held to the same high standards as counseled petitioners. Petition for Certiorari, p. 25a. Turning to the facts of this case, the Court of Appeals held that, in light of the complexity of Gunn's *Sandstrom/Franklin* claim and Gunn's *pro se* status, a reasonable person in his position could not have been expected to raise the claim at the time of Gunn's first federal petition. Therefore the district court judge acted within the bounds of his discretion when he ruled that Gunn had not abused the writ of habeas corpus. Petition for Certiorari, pp. 25a-28a.

B. STATEMENT OF FACTS

On March 23, 1979, Gunn and the victim, Eddie Williams, and several other acquaintances were bowling at the Frontier Lounge in Rabun County, Georgia. Gunn and Williams began to argue about who would win the game.

The argument escalated, Gunn threatened to kill Williams and Williams responded in kind, stating, "I don't need to shoot you, I can do it with these [his hands]." The two removed to the parking lot to settle their differences. A fight appeared imminent but was broken up by the bartender. Gunn testified that he and Williams agreed to meet to continue the fight at a nearby parking lot. The two had fought there before.

Williams and a friend, Mike Shirley, left the lounge in Williams' car. Gunn followed in his car. Williams noticed Gunn following him and remarked to Shirley: "I'm not going to let the son of a bitch follow me around everywhere. I'm going to stop and get this over with." Williams pulled the car over to the agreed-upon spot. All three got out. Williams and Gunn began talking, and Shirley walked away to some bushes to relieve himself. Shirley testified that he saw Gunn pull a sawed-off cue stick from behind his back and hit Williams "at least two" direct blows on the head. Williams fought back, pulling Gunn to the ground and causing him to lose control of the stick. Shirley then came to Williams' aid by grabbing the stick and striking Gunn several times. Eventually Williams and Shirley overcame Gunn, and Williams pinned Gunn to the ground. According to Shirley, Gunn then begged for mercy and Williams freed him. All three participants returned to their cars and drove back to the Frontier Lounge.

Gunn testified that he hit Williams only once, that he did so in self-defense, and that he never intended to kill Williams. He also stated that he and Williams had challenged each other to fight, and that Williams had a rock in his hand when Gunn arrived at the parking lot. Gunn offered to put down his stick if Williams would put down his rock, and "we'd fight like we used to," with fists. Instead Williams advanced, swinging the rock, and Gunn stood his

ground and struck Williams on the head. Williams grabbed Gunn, and the two wrestled on the ground. Shirley then advanced and hit Gunn several times with the stick.

Williams returned home later that night, but was taken to the hospital the next morning. He died later that day. The attending doctor testified that Williams' death was the result of brain damage caused by a blow to the left side of his skull.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' ANALYSIS OF THE ABUSE OF THE WRIT ISSUE WAS FULLY CONSISTENT WITH THE PRECEDENTS OF THIS COURT AND THE APPLICABLE STATUTORY PROVISIONS

The State's principal argument for granting the Petition for Certiorari is that the Court of Appeals' decision somehow created a "special exception" for *pro se* habeas corpus petitioners in abuse of the writ cases. Petition for Certiorari, p. 9. The State claims that the decision "virtually guarantees" that *pro se* petitioners will always be able to avoid application of the abuse of the writ doctrine to bar their successive federal habeas corpus petitions. *Id.*, p. 8. Nothing could be further from the truth. Properly understood, the Court of Appeals' opinion is fully consistent with the precedents of this Court and with applicable statutory provisions.

On the other hand, the rule advocated by the State—that *pro se* habeas petitioners be held to the same high standards as petitioners represented by counsel—is a radical departure from existing law and has never been adopted by any court or legislature. Because the result reached by the Court of Appeals is unquestionably correct, review of its decision is unnecessary, and the State's Petition for Certiorari should be denied.

A. The Equitable Origins of the Abuse of the Writ Doctrine and the Doctrine's Application to Pro Se Habeas Petitioners

Rule 9(b) of the Rules Governing § 2254 Cases (28 U.S.C.A. foll. § 2254) supplies the standards to be applied by district courts in cases involving successive federal habeas corpus petitions. Rule 9(b) states:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds earlier constituted an abuse of the writ.

Thus Rule 9(b) addresses two distinct factual contexts: federal habeas corpus proceedings in which the grounds for relief asserted in the second petition have already been raised and decided in a prior federal proceeding ("successive petition" cases); and cases in which the grounds for relief are being asserted for the first time and were not included or decided in the prior federal habeas application ("abuse of the writ" cases).

Rule 9(b) is essentially a codification of this Court's decision in *Sanders v. United States*, 373 U.S. 1 (1963). *See Potts v. Zant*, 638 F.2d 727, 739 (5th Cir.), *cert. denied*, 454 U.S. 877 (1981); Advisory Committee Note to Rule 9(b), Rules Governing § 2254 Cases (28 U.S.C.A. foll. § 2254). In *Sanders* this Court recognized that "habeas corpus has traditionally been regarded as governed by equitable principles," including the precept that "a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." 373 U.S. at 17. Thus *Sanders* and subsequent decisions construing Rule 9(b) have established that the district court's focus is properly on the conduct of the petitioner in abuse of the writ cases. Specifically, the court is required to determine whether the petitioner has engaged in abusive conduct—such as deliberate withholding or abandonment of claims—that would disqualify the petitioner from being heard on the merits of the subsequent petition. *Id.* at 18.

The equitable underpinnings of the doctrine of abuse of the writ are also clearly evident in this Court's decision in *Price v. Johnston*, 334 U.S. 266 (1948), another case discussed in the Advisory Committee Note to Rule 9(b). In that case, the Court was confronted with a fourth federal habeas petition filed *pro se* by a prisoner who claimed that his conviction under the federal bank robbery statute was obtained through false testimony coerced by the prosecutor. None of the three previous petitions had made this allegation. The State's motion to dismiss the fourth petition as abusive was granted, and the Court of Appeals affirmed. This Court reversed, again emphasizing that equitable principles govern the availability of the writ of habeas corpus. The case was remanded so that a hearing could be conducted on the merits of the petition:

> [E]ven if it is found that the petitioner did have knowledge of all the facts concerning the allegation in question, it does not necessarily follow that the fourth petition should be dismissed .... If called upon, petitioner may be able to present adequate reasons for not making the allegation earlier, reasons which make it fair and just for the trial court to overlook the delay. The primary purpose of a *habeas corpus* proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

344 U.S. at 291. Concerning the *pro se* status of the petitioner, the Court in *Price v. Johnston* had this to say:

> Prisoners are often unlearned in the law and unfamiliar with the complicated rules of pleading. Since they act

> so often as their own counsel in *habeas corpus* proceedings, we cannot impose on them the same high standards of the legal art which we might place on members of the legal profession.

Id. at 292.

Lower courts construing Rule 9(b) in light of *Sanders v. United States* and *Price v. Johnston* have recognized that the *pro se* or counseled status of a habeas petitioner is an important factor for the district courts to consider when deciding whether a petitioner's failure to include a claim in a prior petition constitutes an abuse of the writ. *See, e.g., Mays v. Balkcom*, 631 F.2d 48, 51 (5th Cir. 1980) ("[a] *pro se* petition filed by a petitioner should be examined more liberally than one drawn up by an attorney"); *Booker v. Wainwright*, 764 F.2d 1371, 1376 (11th Cir.), *cert. denied*, 474 U.S. 975 (1985) (quoting *Mays*); *Jones v. Estelle*, 722 F.2d 159, 167 (5th Cir. 1983) (*en banc*), *cert. denied*, 466 U.S. 976 (1984) ("[g]iven [the] elemental role of counsel in our adversary system, we think it inevitable that the inquiry into excuse for omitting a claim from an earlier writ will differ depending on whether petitioner was represented by counsel in the earlier writ prosecution"). The correctness of this approach is unassailable, since in *Price v. Johnston* this Court specifically recognized that a petitioner's inability to grasp the legal significance of relevant facts may be sufficient to excuse conduct which might otherwise be deemed abusive. 344 U.S. at 291. Obviously, recognition of the "legal significance" of facts will often bear a direct correlation to whether or not a petitioner is represented by counsel.

B. The Court of Appeals Correctly Applied Established Abuse of the Writ Principles to the Facts of This Case

The Court of Appeals' decision herein was entirely consistent with the well-established authorities discussed

above. Citing *Sanders v. United States* and *Price v. Johnston*, the court noted that under Rule 9(b) the district court's inquiry should focus on the conduct and knowledge of the petitioner at the time of the initial petition. Petition for Certiorari, pp. 11a-12a. Addressing the standard of knowledge by which a successive habeas petitioner should be judged, the court concluded that an objective standard best served the competing interests of the criminal justice system's interest in finality, on the one hand, and the petitioner's interest in access to the courts, on the other. *Id.*, pp. 20a-21a. Application of a "reasonably diligent petitioner" standard in abuse of the writ cases would thus "minimize abusive conduct without unduly foreclosing the consideration of subsequent petitions that are not truly abusive." *Id.*, p. 21a. Responding to the State's suggestion that Gunn be held to the same standard as a counseled petitioner, the court cited *Price v. Johnston* in support of its conclusion that *pro se* petitioners could not equitably be held to the same standards as counseled petitioners in abuse of the writ cases. *Id.*, pp. 22a-25a. Turning to the facts surrounding Gunn's second federal habeas petition, the court held that, in light of the subtle and complex nature of the claim asserted by Gunn and his *pro se* status, equity required that Gunn's petition be heard on its merits, since a reasonable, uncounseled petitioner in Gunn's position could not have been expected to raise the *Sandstrom/Franklin* claim in 1982. *Id.*, pp. 25a-28a. This result is not surprising or troubling—in fact, it was virtually inevitable, given the precedents of this Court and the policies underlying Rule 9(b).

The State argues repeatedly in its Petition that the Court of Appeals' determination that Gunn did not abuse the writ was based solely on Gunn's *pro se* status. Petition for Certiorari, pp. 8, 10, 11, 13. This is simply untrue. Judge Kravitch's opinion for the majority goes to great

lengths to explain that it was not only Gunn's uncounseled status but also the highly technical nature of his claim which excused Gunn's failure to raise the *Sandstrom/Franklin* issue in his first petition. Petition for Certiorari, pp. 16a, 17a, 25a.

Similarly, the State's professed concern that the standard employed by the Court of Appeals will inevitably lead to a deluge of successive *pro se* habeas petitions which must be addressed on their merits is greatly overstated. In the first place, as pointed out by the Court of Appeals, whether to dismiss a petition on abuse of the writ grounds or to address its merits is committed to the district court's sound discretion. Petition for Certiorari, pp. 13a-14a. The exercise of that discretion will rarely be disturbed, regardless of whether it is exercised to address the petition's merits, as in this case, or to dismiss the petition as abusive, as often occurs. *See* Petition for Certiorari, p. 27a ("[h]ad the district court come to a conclusion other than the one it did, we cannot say that that decision would have been an abuse of discretion either"). Moreover, the State's "floodgates" argument overlooks the fact that an abuse of the writ determination is a preliminary matter and does not reach the actual merits of the petition. Meritless petitions, even if brought *pro se*, will continue to be denied by the district courts and affirmed by the Courts of Appeal. Finally, the State's contentions also fail to recognize that the federal courts, including those in the Eleventh Circuit, have not been the least bit hesitant to hold that *pro se* petitioners have abused the writ in appropriate cases. *See, e.g., Booker v. Wainwright*, 764 F.2d 1371, 1376-77 (11th Cir.), *cert. denied*, 474 U.S. 975 (1985); *Miller v. Bordenkircher*, 764 F.2d 245, 251 (4th Cir. 1985); *Mays v. Balkcom*, 631 F.2d 48, 51 (5th Cir. 1980).

C. The State's Remaining Arguments for Granting Certiorari Are Without Merit

The State's remaining arguments for granting certiorari do not survive serious scrutiny. This Court's recent decision in *Teague v. Lane*, ___ U.S. ___, 109 S.Ct. 1060 (1989), cited by the State, has no direct bearing on this case, since any questions of retroactivity surrounding the *Sandstrom/Franklin* claim asserted by Gunn were fully addressed and decided in *Yates v. Aiken*, 484 U.S. 211 (1988). The State cannot seriously maintain that the fact that Gunn was not constitutionally entitled to representation by counsel in his first federal habeas proceeding, *see Murray v. Giarratano*, ___ U.S. ___, 109 S.Ct. 2765 (1989), means that he should be penalized for acting as his own attorney in that proceeding. Such a result is unthinkable in light of the purpose of Rule 9(b) and this Court's decisions in *Sanders v. United States* and *Price v. Johnston*, as discussed above. Finally, the State's blithe assertion that the analysis in abuse of the writ cases should be limited to a determination of whether a particular claim is "available" as a legal matter, without reference to the petitioner's status, simply ignores the equitable origins of the abuse of the writ doctrine and the settled precedents of this Court. Those precedents require, at a minimum, that the district court examine the conduct of the petitioner to determine if it was abusive. A given petitioner's conduct—and particularly whether that petitioner was aware that certain facts presented grounds for legal relief—is inextricably linked to the counseled or uncounseled status of that petitioner. Basic fairness and the opinions of this Court require that the petitioner's conduct and status be considered by the district court, in addition to the abstract availability of a legal claim.

The State also appears to argue that this case is worthy of review because the objective standard employed by the Court of Appeals in evaluating Gunn's knowledge and conduct is inconsistent with the prevailing standards in the Fourth and Fifth Circuits. Petition for Certiorari, pp. 11, 14. This argument is strange indeed, since the "reasonably diligent petitioner" standard espoused by the Eleventh Circuit Court of Appeals in this case is more stringent for the petitioner, and thus more favorable to the State, than the subjective standard in effect elsewhere. Moreover, upon close examination, any apparent conflict between the two standards is resolved by the Court of Appeals' observation that, without saying so, courts have in fact applied an objective standard for years in abuse of the writ cases. *See* Petition for Certiorari, pp. 19a-20a.

The unreasonableness of the State's legal position herein is vividly demonstrated by the result that would have obtained had the Court of Appeals adopted the State's arguments and reversed the grant of habeas relief to Gunn. This case involves Gunn's omission from his 1982 federal habeas petition of a claim that the jury instruction given at his trial violated the Constitution under the principles articulated in *Sandstrom v. Montana*, 442 U.S. 510 (1979). During the same time period, numerous federal and state court judges examined the very charge given at Gunn's trial and found no constitutional violation. *See Skrine v. State*, 244 Ga. 520, 260 S.E.2d 900 (1979); *Bright v. State*, 251 Ga. 440, 306 S.E.2d 293 (1983); *Franklin v. Francis*, 720 F.2d 1206 (11th Cir. 1983), *aff'd*, 471 U.S. 307 (1985) (reversing district court's holding that charge did not violate *Sandstrom*). Thus the practical effect of a reversal in this case would be to hold that Gunn, a *pro se* habeas petitioner, was responsible for anticipating arcane, technical legal developments which eluded many federal and state judges during the same time period. The

irony of such an unjust result was apparent to the Court of Appeals: "It would be odd indeed if we were to hold that the court had erred in finding that a *pro se* petitioner was not reasonable in reaching the same conclusion as that reached by justices of the Georgia Supreme Court and of the United States Supreme Court." Petition for Certiorari, pp. 26a-27a. Such a result cannot be consistent with Rule 9(b) or the precedents of this Court.

As the Court of Appeals recognized, it is the State—not Gunn—that is seeking to break new legal ground in this case by arguing that *pro se* petitioners should be held to the same high standards as counseled petitioners:

> The state would have us cut abuse of the writ loose from its equitable origins, and instead adopt a rule that *pro se* petitioners should be held to the same standard of knowledge as a lawyer. Mindful that "the importance of the writ necessit[ates] that it not lose its effectiveness in a procedural morass," *Price v. Johnston*, 334 U.S. at 269, 68 S. Ct. at 1052, and mindful of the fairness implicit in equitable doctrines, we reject the state's argument.
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> * * *
>
> It is entirely inconsistent with . . . equitable principles . . . to suggest that courts should impute the knowledge of a lawyer to a *pro se* petitioner. We will not so distort the law as to articulate the rule that a petitioner knowingly foregoes something that he does not know about, nor with reasonable diligence could have discovered. We take some solace from the observation that, until now, no court has even considered the state's view a credible alternative.

Petition for Certiorari, pp. 22a, 25a. After careful deliberation, the *in banc* Court of Appeals rejected the abrupt break with precedent sought by the State. This Court should likewise decline to grant review even to consider adoption of the extreme positions advocated by the State in this case.

CONCLUSION

The Court of Appeals' affirmance of the district court's ruling that Gunn did not abuse the writ was firmly grounded in the precedents of this Court. Gunn's status as a *pro se* petitioner, while not dispositive, was properly considered by both the district court and Court of Appeals in determining whether Gunn abused the writ of habeas corpus. Because the decision of the Court of Appeals is consistent with this Court's precedents and the history and purpose of Rule 9(b), review by this Court is unnecessary, and the State's petition for certiorari should be denied.

Respectfully submitted,

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